

ADMINISTRATIVE RULEMAKING

(Courtesy of Richard Whisnant, Institute of Government, UNC-CH)

I. Administrative Agency

- A. According to the Administrative Procedures Act (APA), an administrative agency is a unit of government in the executive branch. The Commission for MH/DD/SAS is an administrative agency.
- B. An administrative agency gets things done through rulemaking, adjudication (permitting, licensing, fee collecting, enforcement, etc.), or direct services.

II. Administrative Law

- A. The rules and principles for administering government, particularly the executive branch: the authority and structure of administrative agencies, the processes used by those agencies, the validity of particular agency decisions, and the roles of the other branches of government in relation to the agencies.
- B. The structure of administrative law
 - 1. Constitutional law
 - 2. “Organic” statutes (passed by the legislature regarding what is to happen broadly)
 - 3. G.S. 143B and other “generic” statutes (govern structure of state government)
 - 4. Executive orders
 - 5. Rules and cases (courts)
 - 6. Administrative Procedures Act

III. Rules

- A. Definition: “Rule” means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. G.S. 150B-2(8a).
- B. Ten categories of exceptions, including statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
- C. Legal Power of a Rule: is the same as a statute (in theory). A “policy” can only be enforced internally, not against non-agency personnel (because it has not gone through rulemaking process).
- D. The Cardinal Rule of Rules: If it meets the definition of a “rule,” and the agency has no express exception, then it’s enforceable only if it went

through the rulemaking process.

IV. Rulemaking Authority

- A. Need explicit (power to make rules on specific topics) or implicit (meeting place, time, etc. – details decided by members) authority from the legislature.
- B. The Division staff versus Commission, and Secretary of DHHS versus Commission regarding authority and power (G.S. 122C-27 Powers of the Secretary)
- C. Other limitations: G.S. 150B-19
- D. The nondelegation doctrine and adequate guiding standards (power delegated to agencies, and guidance received from legislature).

V. Rulemaking Process

- A. Refer to *NC Administrative Rule Process*
(<http://www.oah.state.nc.us/rules/flowchart.pdf>)
- B. **Temporary Rules** (refer to G.S. 150B-21.1)
 - 1. Threshold requirements: permanent rule making must be “contrary to public interest” AND one of the following holds:
 - a) A serious and unforeseen threat to the public health, safety or welfare
 - b) The effective date of a recent act of the general assembly or the United States Congress
 - c) A recent change in federal or state budgetary policy.
 - d) A federal regulation
 - e) A court order
 - f) The need for the rule to become effective the same date as the State Medical Facilities Plan approved by the Governor, if the rules addresses a matter included in the State Medical Facilities Plan
 - 2. Very abbreviated process
 - 3. Very limited review – send to the Codifier of Rules in the Office of Administrative Hearings (OAH); temporary rule can still go into effect even if OAH doesn’t approve it.
 - 4. Short duration – no more than 270 days to get permanent rule to the Rules Review Commission (then temporary rule can stay in effect until permanent rule goes through process). Permanent rulemaking should begin immediately.
- C. **Permanent Rules** (refer to G.S. 150B-21.2 for specifics)
 - 1. Gatekeepers:
 - a) Commission or Secretary (can object on any grounds)
 - b) Governor (potentially involved)
 - c) OSBM (fiscal note)
 - d) Office of Administrative Hearings (format and process)

- e) Rules Review Commission (authority, clarity, burdensomeness, process)
- f) Judicial (very limited, since a rule that passes Rules Review Commission and is published is conclusively deemed to have met the APA requirements for rulemaking)

D. Rules Review Commission (RRC)

- 1. Rules must be approved by the RRC to take effect.
- 2. RRC reviews rules for authority, clarity, necessity, and compliance with procedural requirements.
- 3. The RRC is the last place a rule goes before going to the General Assembly.
- 4. For a more detailed description of the authority and function of the Rules Review Commission, refer to *Role of the Rules Review Commission* by Joseph J. DeLuca, Jr. [\(link to RRC Word document\)](#).

E. Collection and Publication of Rules

- 1. The codifier of rules in the Office of Administrative Hearings
- 2. N.C. Register
- 3. The N.C. Administrative Code (NCAC)
- 4. Other sources for monitoring rulemaking (such as agency mailing lists)